

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 6, 2009 Session

**IN RE: J.S.M.**

**Appeal from the Juvenile Court for Rutherford County  
No. TC938 Donna Scott Davenport, Judge**

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**No. M2009-00605-COA-R3-PT - Filed September 21, 2009**

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The mother of a thirteen-year-old child appeals the termination of her parental rights. The termination action was filed by the aunt and uncle of the minor child against both parents; the Department of Children's Services was not involved. Counsel was appointed to represent each parent and a guardian ad litem was appointed for the child. The trial court found two grounds for termination of both parents' rights and found that termination was in the best interest of the child. For these reasons, the court terminated the parental rights of both parents. Mother appealed the termination of her parental rights; Father did not appeal. On appeal, Mother contends *inter alia* that she did not willfully fail to visit, thus she did not abandon the child, and the trial court erred by making generalized findings regarding her alleged failure to change her conditions. Finding no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Peter Trenchi, Sewanee, Tennessee, for the appellant, the mother of the child.

Darrell L. Scarlett, Murfreesboro, Tennessee, for the appellees, the petitioners.

Berry Foster, Smyrna, Tennessee, Guardian ad Litem.

**OPINION**

Although there is a long and disappointing domestic and parenting history involving Mother and child, the logical starting point for the relevant history of this matter occurred two years prior to the trial of this action when Mother asked her sister and brother-in-law to "come pick up [the child] and get her" due to domestic violence in Mother's home. The child has remained with her aunt and uncle ever since.

Thereafter, on Oct. 18, 2006, an Emergency Petition for Temporary Custody was filed by the child's aunt and uncle – mother's sister and brother-in-law. The trial court determined that both parents were indigent and appointed separate counsel to represent each of them. The court also appointed a guardian ad litem to represent the child. On Oct. 23, 2006, "Mother agree[d] to a finding of dependency and neglect based upon her lack of residential stability." During this preliminary hearing, Mother was granted supervised visitation every other Sunday, but she never exercised her right to visit with the child.

A final adjudicatory hearing concerning the dependency and neglect action was conducted on October 29, 2007. In the order that followed, the Court found:<sup>1</sup>

1. Neither parent has parented [the child]. They have caused her to be in improper guardianship or control that would injure or endanger her health due to the following:
  - a) Domestic violence between the parents; and
  - b) inappropriate conduct between the parents; and
  - c) inappropriate conduct between parents and [the child].
2. [The child] has suffered from environmental neglect and residential instability based upon the fact that neither the Mother nor the Father is able to provide necessities. There has been at least one time when there was no telephone service (immediately following removal); there has been at least one time when there was no electricity; and, there has been improper food in the home.
3. [The child] is a drug-exposed child, both by drugs and alcohol. Both parents are responsible for said exposure, as both parents have been intoxicated – either by drugs or alcohol – in her presence on a regular basis.  
...
5. Additionally, both parents have abandoned this child, as both have been non-compliant with previous court orders and have missed prior court dates. Additionally, both parents have failed to show up (again) today for this hearing. Both parents have failed to comply with prior court orders that would allow them some time of involvement with [the child]; hence, they have basically abandoned [the child].

After making the above findings of facts, the trial court concluded that it would cause a substantial risk of harm to place the child back with her parents and that it was in the child's best interest that the petitioners be granted full and final custody.

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<sup>1</sup>The Final Adjudication Order was filed on December 18, 2007.

On July 2, 2008, more than six months after the child was removed from her parents' custody and care, this petition for termination of the parents' rights was filed. One of the grounds for termination of each parent's rights was abandonment, as that term is defined in Tenn. Code Ann § 36-1-102. Another ground was persistence of conditions.

The petition to terminate went to trial on January 16, 2009. As of the time of trial, the child had not seen either of her parents for almost two years, and neither parent had made any substantial changes in the circumstances or conditions that led to the child's removal.

The child, who was thirteen years of age at the time of trial, testified at trial stating that she was happy at the petitioners' home "[b]ecause I'm able to go to school and I don't have to worry about not getting fed. We always have food on the table when we get home." She also testified that, while previously living with her parents, there was no food in her parents' house on occasion, that while living with her parents she said she was afraid because her parents fought regularly, and that the police were called to her parents' home on a couple of occasions, which scared her. She testified that her parents would yell at her when they knew a representative of the Department of Children's Services was coming to the house, insisting that she tell the Department representative that nothing was wrong when, in fact, she was scared.

During the trial, in an effort by counsel to emphasize the stark differences in her parents' home and the petitioners' home, the child was asked:

- Q: On a scale of one to ten how would you rate things at your aunt's and uncle's house? And I'm talking about overall, school, health, food, warmth, love.  
A: A ten.  
Q: What would you rate that when you were with mom and dad?  
A: Two.

On March 5, 2009, the trial court entered its order finding in pertinent part that Mother had the right to supervised visits since the final adjudicatory hearing on October 29, 2007, and that she "failed to visit even though she knew she could visit with the child under the terms of the Adjudicatory Order." Based on this finding of fact, the court concluded that Mother "willfully and intentionally failed to visit or even have token visitation with the minor child so as to have abandoned the minor child." As for persistent conditions, the court found that since the child was removed from Mother's care and custody on October 18, 2006, the domestic violence still exists between Mother and Father; that the child was brought into Court in October 2006 "with no care at all from the mother;" that "the mother posed a substantial risk of harm to the child at that time;" that at the trial, Mother still had alcohol and substance abuse problems; that Mother was recently arrested for D.U.I.; and that "the conditions of instability, emotional and substance abuse issues still exist today." Based on these findings the trial court concluded that "there is no likelihood the mother's conditions can be remedied at any early date" and "the continuation of the parent/child relationship with the mother greatly diminishes the child's chance of being in a safe, stable and permanent home."

As for the child's best interest, the trial court found that the parents had no meaningful parent/child relationship with the child, that neither parent had made an adjustment of circumstances or conduct or conditions that would make it safe for the child to be placed with either of them; that the petitioners are and have been the care providers for the child for over two years; and that a strong bond exists between the petitioners and the child and changing caretakers would be an extreme emotional and psychological detriment to the child. For these reasons, the court found it in the child's best interest to terminate both parents' rights.

#### ANALYSIS

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions, that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence. See *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interest of the child). Therefore, a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Whether a statutory ground has been proven by the requisite standard of evidence is a question of law to be reviewed de novo with no presumption of correctness. *In re B.T.*, No. M2007-01607-COA-R3-PT, 2008 WL 276012, at \*2 (Tenn. Ct. App. Jan. 31, 2008) (no Tenn. R. App. P. 11 application filed) (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

#### GROUND S FOR TERMINATION

A parent's parental rights may be terminated on the ground of abandonment. Tenn. Code Ann. § 36-1-113(g)(1). The statute provides several alternative definitions of "abandonment," in particular and as it pertains to the instant case, a parent has abandoned their child if:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

Tenn. Code Ann. § 36-1-102(1)(A)(i). Another ground for termination of a parent's rights is that the child has been removed from the parent's home by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) . . . , still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) . . . in the near future; and

(C) The continuation of the parent . . . and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3).

The evidence in this record clearly and convincingly supports the trial court's findings that Mother abandoned her child by willfully failing to visit the child. The evidence in this record also clearly and convincingly supports the trial court's findings that Mother failed to remedy persistent conditions, there is little likelihood that these conditions will be remedied so that the child can be safely returned to the parent in the near future, and the continuation of the relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home. Thus, two statutory grounds for termination of Mother's parental rights have been established.

#### THE CHILD'S BEST INTEREST

The trial court also found that termination of Mother's parental rights was in the child's best interest. In determining whether termination of parental rights is in the best interest of a child, the court is to consider certain statutory factors, including the following:

(1) Whether the parent . . . has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent . . . ;

- (2) Whether the parent . . . has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent . . . has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent . . . and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent . . . , or other person residing with the parent . . . , has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's . . . home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent . . . consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's . . . mental and/or emotional status would be detrimental to the child or prevent the parent . . . from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent . . . has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

Considering the relevant statutory factors regarding the best interest of the child, a reasonable person could only come to one conclusion—that it is no longer in the best interest of the child to continue the parent-child relationship. More than two years have passed since the child was removed and Mother has failed to make any substantial changes in her circumstances or conditions, as the trial court correctly found. Further, the child is in a stable and loving environment with her aunt and uncle, and a change of caretakers and physical environment is very likely to have a significant adverse effect on the child's emotional and medical condition. We, therefore, affirm the trial court's finding that termination of Mother's parental rights is in the best interest of the child.

### **IN CONCLUSION**

The evidence clearly and convincingly supports the trial court's findings that Mother abandoned her child by willfully failing to visit the child and that she failed to remedy persistent conditions. Thus, two statutory grounds for termination of Mother's parental rights have been established, and the evidence clearly and convincingly supports the trial court's finding that termination of her parental rights is in the child's best interest. We, therefore, affirm the termination of Mother's parental rights.

The judgment of the trial court is affirmed in all respects, and this matter is remanded with costs of appeal assessed against Mother.

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FRANK G. CLEMENT, JR., JUDGE